

Mark R. McGuire

ATTORNEY AT LAW

A Professional Corporation
2311 Calle Las Palmas
San Clemente, CA 92672
(949) 584-1126 • (949) 492-8818 (fax)
Email: mrmcguirelaw@cox.net

ITEM 11
CATTARAUGUS DOC # 44
SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD

2003 MAY -5 A 9:04

May 1, 2003

John Robertus, Executive Director
San Diego Regional Water Quality Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Request to Modify CAO R9-2003-0158 (Pioneer Builders)

Dear Mr. Robertus:

I represent Pioneer Builders on this matter. We respectfully request that Clean-up and Abatement Order R9-2003-0158 (the "CAO") be modified to allow Pioneer to implement on-site wetland/riparian creation in a slightly different configuration than existed previously. The amount restored would be the same as required in the CAO, and we also propose an off-site wetland creation or enhancement component as mitigation for the impacts that have already occurred. This modification would allow us to satisfy the clear preference of the Department of Fish and Game and the Corps of Engineers to implement the majority of mitigation in an off-site location with greater biological conservation value while still creating an on-site wetland with greater function and value than the wetland area impacted by construction.

We were surprised to receive the CAO dated April 11, 2003, as we were in the process of responding by the April 30, 2003 deadline set forth in the April 7, 2003 Notice of Violation and Request for Technical Report concerning construction site BMPs and submittal of a Notice of Intent (NOI) to discharge storm water. Evidence that the NOI was submitted and a copy of the Storm Water Pollution Prevention Plan has been provided to your staff.

The February 14, 2003 Notice of Violation asserting failure to timely file a report of waste discharge and 401 Water Quality Certification application did not have a set date for responding, but we were working with the Corps, the Department of Fish and Game and Jeremy Haas of your staff to arrive at an acceptable combination of on and off-site mitigation to allow for "after-the fact" authorization of impacts. We presumed, perhaps mistakenly, that the Corps was taking the lead among the agencies in resolving this matter (see attached e-mail from the Corps and letter from CDFG). However, Jeremy Haas was aware of our efforts to locate off-site restoration opportunities (he even recommended some people to contact) and that construction activities were continuing on-site. We submitted the request for 401 Certification on April 17, 2003.

The on-site wetland we are proposing would provide better treatment than provided by the previous wetland area on-site. The same off-site nuisance runoff would flow through the created wetlands, but the created wetlands will have a gravel bed below the soft-bottom channel for improved retention time and an improved ability to remove imported elements and compounds. Moreover, the urban runoff that runs through the wetlands will be treated a second time via a CDS unit before entering the larger storm drain system (it is also worth noting that each of the project's lots contains a filtered inlet). The created wetland will also have higher biological function than the one impacted because it will have native flora rather than predominately non-native flora. However, we agree with the Fish and Game and the Corps that the small, in-fill nature of the site limits the biological value of any on-site habitat that existed previously or that will be created.

It is not feasible to restore the previous wetland swale, not because of the construction that has occurred, but because it would result in at least a 25% reduction in the number of homes and require another redesign of this two-acre subdivision approved in July 2001. The project has already been redesigned to address concerns of adjacent residents. In fact, Ms. Tappan and Ms. Drummond, the two neighbors who testified before the Board on this item last month, both pushed for and supported the redesign ultimately adopted, and neither previously called for the preservation of the wetland swale between the storm drain outlet and storm drain inlet (see Planning Commission meeting minutes attached). Up until quite recently, Ms. Tappan's concerns appeared to be that the nuisance flows from the storm drain outlet may be the cause of cancers and other illnesses suffered by those living near the channel (see local newspaper article attached). While there is no evidence to support this fear, one of the benefits of the project as designed is that it would treat urban runoff from the off-site storm drain outlet via a CDS unit. Restoring wetlands at the previous elevation would preclude treatment of the runoff through the CDS unit.

I have listened to the tape containing the public comment testimony of Ms. Tappan and Ms. Drummond during the Board's April hearing. The assertions that the City of Dana Point violated CEQA, that the developer deliberately ignored the laws and regulations applicable to wetlands, and that the developer is now "stalling" the process in order to get to a point where restoration of the wetland swale to its exact previous location is physically or financially impossible are all absolutely false. It is unfortunate that these assertions were made in writing and orally in without any notice to or an opportunity for Pioneer to be heard. It is also troubling that the Board, hearing only "one side of the story," felt that the case had been made to direct staff to take enforcement actions beyond those actions that had already been initiated.

First, the City of Dana Point properly used the CEQA exemption for small, in-fill development under five-acres and consistent with applicable zoning. The State Office of Planning and Research established this categorical exemption to create a rebuttable presumption that such small projects consistent with all planning documents do not have significant environmental impacts. The City was well aware of this open channel containing primarily weedy species and did not see it as negating the use of this exemption. Ms. Tappan and Ms. Drummond, whose back yards abut the channel, were surely aware of it as well. Yet neither of them objected to the project's impacts to this area or claimed that the CEQA in-fill exemption was improper when they testified at the public hearings on the subdivision.

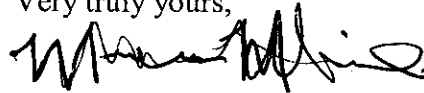
Second, while it was a mistake to fill the area containing wetland vegetation without first discussing the matter with the various resource agencies, the impacts did not occur until after Pioneer obtained the professional opinion from a qualified consulting firm that this feature was an isolated trench\swale on historic uplands constructed to connect two parts of a larger storm drain system and, therefore, was not jurisdictional. The resource agencies have asserted a contrary view (namely, that it is a relict reach of a historical ephemeral drainage feature interconnected to navigable waters via the storm drain system). Rather than engage in a lengthy dispute in an area of law that is very complicated and currently in a state of flux, Pioneer Builders has agreed to work with the agencies to process "after-the fact" authorizations for the impacts, and has even agreed to accept a higher than usual compensatory mitigation ratio.

Third, there has been no attempt to stall the processing of the after the fact authorizations; indeed, it is in Pioneer's interest to resolve this matter as soon as possible, which is precisely why Pioneer elected not to contest the jurisdictional determinations made. However, it is important to put on the record that, contrary to the claims made to the Board last month, this 0.06-acre area was not part of the historical inventory of natural wetlands that have been lost in California. Assuming that the storm drain outlet constructed in 1974 was built to outlet subdivision runoff into a natural drainage feature, any natural drainage that existed prior to 1974 was likely unvegetated and smaller than 0.01 of an acre. It is interesting to note that the Board today would never allow a storm drain to outlet directly into a natural ephemeral drainage, which is what created the wetland area that existed on-site (again, assuming Pioneer's consultant was wrong in characterizing the swale as artificially constructed).

In conclusion, we apologize to you and the Board for not consulting with your staff prior to initiating impacts and we regret the delay in submitting the request for 401 Certification. Please consider our request to amend the CAO to allow for an on-site wetland superior in function and value to that which previously existed with an additional off-site mitigation component, which the Corps and the Department of Fish and Game feel is appropriate.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mark McGuire", written over a horizontal line.

Mark R. McGuire

Cc: Russel Kaiser and Corrice Farrar, USACE
Don Chadwick and Donna Cobb, CDFG



DEPARTMENT OF FISH AND GAME

<http://www.dfg.ca.gov>
4949 Viewridge Avenue
San Diego, CA 92123
(858) 467-4201



April 15, 2003

Mark Durham
Chief, South Coast Section
Department of the Army
Los Angeles District, Corps of Engineers
P.O. Box 532711
Los Angeles, California 90053-2325

**SUBJECT: LETTER OF JURISDICTIONAL DETERMINATION ENFORCEMENT CASE
NO. 200300461-CJF DATED FEBRUARY 4, 2003**

Dear Mr. Durham;

The California Department of Fish and Game (Department) concurs with the US Army Corps of Engineers' analysis that the "wetland" located at the 2-acre site known as the Castillo del Mar Development, along Camino Capistrano in the City of Dana Point is the remnant of an unnamed stream, tributary to the Pacific Ocean. Therefore, our agencies should have been notified of the proposed action as prescribed by the respective laws we administer. We support the US Army Corps of Engineers' enforcement action that requires a ratio of 5:1 compensation to impact for the unauthorized activities on the subject site. We concur that mitigation should occur both on-site and off-site; however, we recommend that the majority of the mitigation occurs off-site at a location that has long term wildlife conservation value.

The Department is deferring filing a complaint with the Orange County District Attorney's office for the violation of section 1603 of the California Fish and Game Code, so that the US Army Corps of Engineers can finalize an administrative solution that meets our agencies' concerns. It is also our understanding that the San Diego Regional Water Quality Control Board is also work diligently on resolving this matter.

The Department wishes to coordinate with the agencies involved in mitigation site selection, the review of any Habitat Management Plan, and other minimization/protection measures. If this matter can be resolved in a coordinated administrative manner, it will allow the Department to avoid filing a formal complaint. Please coordinate mitigation site selection and measures with Donna Cobb, Environmental Scientist, at 858-637-5510.

Sincerely,

Donald R. Chadwick
Senior Environmental Scientist

Paul Douglas

From: "Farrar, Corice J SPL" <Corice.J.Farrar@spl01.usace.army.mil>
To: <pep500@cox.net>
Cc: <ggarcia@danapoint.org>; <spashalides@danapoint.org>; <bwarren@danapoint.org>; "Laura Crum (E-mail)" <LCrum@dfg.ca.gov>; "Jeremy Haas (E-mail)" <haasj@rb9.swrcb.ca.gov>; "Durham, Mark SPL" <Mark.Durham@spl01.usace.army.mil>; "Kaiser, Russell L SPL" <Russell.L.Kaiser@spl01.usace.army.mil>; "Allen, Aaron O SPL" <Aaron.O.Allen@spl01.usace.army.mil>; "Greg Gearheart (E-mail)" <GGearheart@exec.swrcb.ca.gov>; "Pam Tappan (E-mail)" <prtappan@cox.net>
Sent: Monday, February 03, 2003 1:55 PM
Subject: Work at Pioneer Builders' site at 35262 and 35272 Camino Capistrano, Dana Point

Mr. Douglas:

The purpose of this email is to follow up with Russ Kaiser and my site visit of Friday, 1/31/03. After additional review of our project file, historical aerals, and discussions with both our Section and Acting Branch Chiefs, we have determined that the site at issue is a jurisdictional wetland and notification to the Corps prior to construction was required. We will be forwarding a more detailed and formal letter of jurisdiction.

Although the action was unauthorized, we would be willing to process the action under an after-the-fact Nationwide Permit, provided Pioneer Builders acts in good faith to participate in the permitting process. Given the circumstances, we recommend that you submit a formal application packet to us for processing of an after-the-fact permit. Based on preliminary information provided to date, it is our understanding that the project may qualify for a Section 404 Nationwide Permit 39 for Residential Development. We will consider proposals for either on- or off-site mitigation at a ratio of 5:1.

Additionally, a 401 Certification is required from the San Diego Regional Water Quality Control Board, and a Streambed Alteration Agreement may be needed from the California Department of Fish and Game.

Furthermore, we recommend you promptly implement some Best Management Practices on site to avoid any direct or indirect affect on downstream water quality. Please coordinate these measures with the San Diego Regional Water Quality Board.

If you should wish to discuss this matter either before or upon receipt of the formal letter of jurisdiction, please do not hesitate to contact either Russ Kaiser at 213/452-3293 or myself at 213/452-3296.

Cori Farrar
Project Manager
Regulatory Branch
U.S. Army Corps of Engineers - Los Angeles District

Mailing Address: P.O. Box 532711, Los Angeles, CA 90053
 Tel: 213-452-3296; Fax: 213-452-4196
 E-mail: corice.farrar@usace.army.mil
 COE website: www.spl.usace.army.mil/regulatory/

**CITY OF DANA POINT
PLANNING COMMISSION
REGULAR MEETING MINUTES**

July 18, 2001
7:02-11:20 p.m.

PAGE 4

ACTION: Motion made (Lacy) and seconded (Denton) to adopt Resolution 01-07-18-39 with amendments approving Coastal Development Permit CDP01-10 and Site Development Permit SDP01-27. Motion carried 5-0. (AYES: Chilton, Denton, Goodkind, Lacy, Schoeffel NOES: None ABSENT: None ABSTAIN: None)

ITEM 4: Tentative Tract Map TTM16197 to subdivide a 2-acre site into 8 numbered lots and 1 lettered lot to accommodate development of 8 new single-family homes on a vacant site in the Capistrano Beach area. (Continued from the regular Planning Commission meeting of June 6, 2001).
(FF# 0600-10/TTM16197/Camino Capistrano, 35262 & 35272) [SP]

Applicant/

Owner: Pioneer Builders, Inc./Monaco Homes

Location: On the northern side of Camino Capistrano, between Paseo Pinzon and Calle Anejo

Environmental: Pursuant to the provisions of the California Environmental Quality Act (CEQA), this project is categorically exempt (Class 32 – Section 15332 – In-fill Development) from the provisions of the CEQA because it occurs within the City limits on a site less than five acres in size that is substantially surrounded by urban development and the project will not result in any significant effects.

Request: Approval of a Tentative Tract Map to subdivide a 2-acre site into 8 numbered lots and 1 lettered lot for the development of 8 new residential units and related site improvements on a vacant site on Camino Capistrano.

Recommendation: That the Planning Commission adopt the attached draft Resolution approving Tentative Tract Map TTM16197 for the development of 8 new residential units on a 2-acre site.

Sara Pashalides (Planning Consultant) reviewed the Staff report.

Chairman Schoeffel opened the public hearing.

Terry Hirschag (Applicant) stated that he had met with the neighbors of the project as the Planning Commission had directed him to do. He felt that couldn't design the project to satisfy everyone.

Mark Mitchell (Mission Viejo) stated that they had spent many months and much money working to determine what the wishes of the people were on this project.

**CITY OF DANA POINT
PLANNING COMMISSION
REGULAR MEETING MINUTES**

July 18, 2001
7:02-11:20 p.m.

PAGE 5

He added that the two (2) property owners that have a concern with the project as presented currently have only ten-foot rear yard setbacks.

Krish Charl (Capistrano Beach) asked the Planning Commission to help the residents and the property owners reach a compromise.

Julianne Kipper (Capistrano Beach) stated that she supports the reversed plan as proposed tonight.

→ **Pam Tappan** (Capistrano Beach) stated that Sara Pashalides was a credit to the community and thanked her for all of her help in understanding this project. She added that she supports the reversed plan.

→ **Barbara Drummond** (Capistrano Beach) stated that she does not object to development on the property and asked for approval of the reversed plan with the addition of her Exhibit A.

Chairman Schoeffel recessed the meeting at 8:25 p.m.

Chairman Schoeffel reconvened the meeting at 8:35 p.m.

Philip Schwartze (San Juan Capistrano) stated that the Drummond's had asked for his input on this project and had created Exhibit A to help the Drummond's gain more privacy in their rear yard.

David Crain (Capistrano Beach) stated that he was very impressed with the quality of Pioneer Builder's work. He added that Pioneer blends their homes into the surrounding neighborhood.

Robert Zax (Capistrano Beach) stated that his home will be deprived of sunlight and that they will suffer if the development is built. He felt that the project would not fit into the surrounding neighborhood and that gates will end the friendly feel they currently enjoy. He stated that he would prefer the homes to be built back-to-back with the existing homes to provide a twenty-five (25) foot setback.

Rick Olsen (Capistrano Beach) stated that this will be a good development and asked for the Commission's approval of the project.

Chairman Schoeffel closed the public hearing.

Vice-Chairman Lacy stated that he supports the project as presented and that he would like a compromise for the two homes that will be most affected by the development. He added that for the Drummond's he was supportive of their

MUDDY WA-

TERS: One excavation machine is used on Tuesday to dig out another that sunk into the wet earth on Monday and got stuck while grading the vacant lot at Calle Anejo and Camino Capistrano in Capistrano Beach. The city on Tuesday issued a stop work notice for the site while it waits for reports from the Army Corps of Engineers and California Department of Fish and Game on whether the site is wetlands.

Dennis Kaiser
Dana Point News

Work stuck in wetlands query

City shuts down grading at site while it waits for word from Army Corps and state Fish and Game.

By DENNIS KAISER and FRED SWEIGLES
The Dana Point News

City officials on Tuesday issued developer Paul Douglas a notice to stop grading work on his project to build eight homes on the empty lot a Calle Anejo and Camino Capistrano.

"We had concerns relating to water quality best management practices," said City Manager Doug Chotkevys.

The concerns were prompted in part by the fact that one of Douglas' large excavation machines on Monday morning sunk in the wet dirt at the site and got stuck.

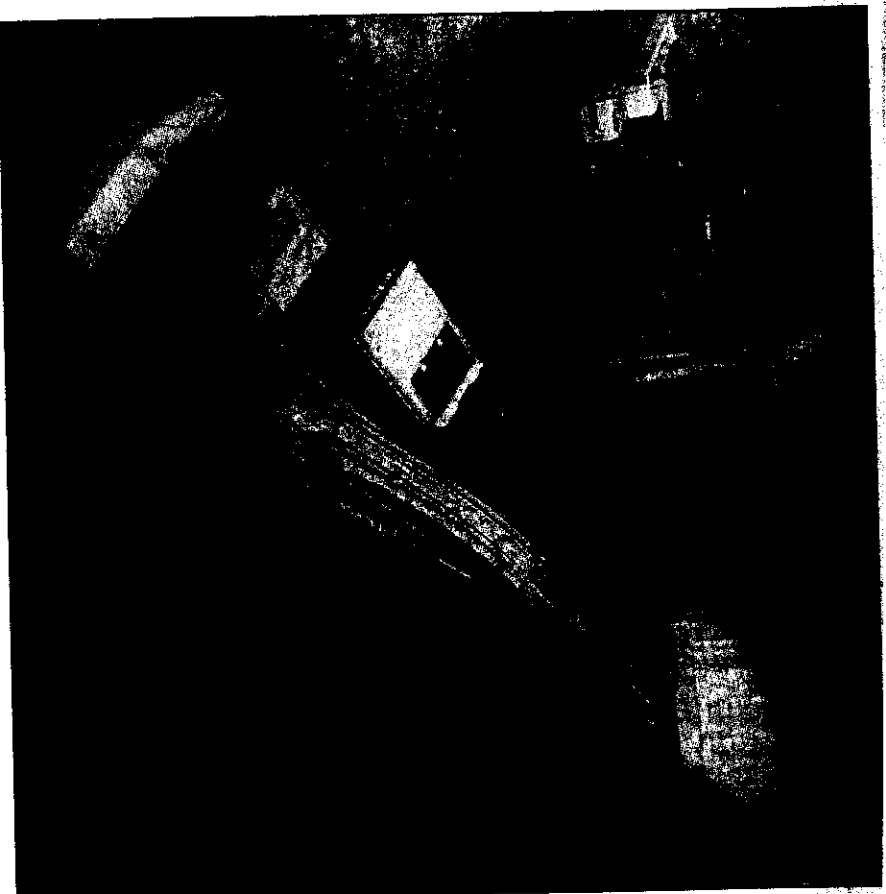
It took another large heavy machine until about 11:30 a.m. on Tuesday to dig it out.

Chotkevys said the question of whether the site was an artificial drainage area or nat-

ural wetlands has been raised anew by the Army Corps of Engineers and the California Department of Fish and Game.

"We are providing the biology reports that staff used in response to the City Council's questions when the city approved the project," Chotkevys said. "We are waiting for a response, once they have had a chance to compile their field notes and review the reports."

See STUCK, page 18



Boat name payment is past due

Matching funds donation to help future installments be made more timely

By DENNIS KAISER
The Dana Point News

The Ocean Institute this week announced it has received an anonymous donation that will cover the last \$200,000 it must raise in matching funds for the \$500,000 the city of Dana Point is paying for naming rights to the tallship The Spirit of Dana Point.

Dan Gee, institution president, said the donation was sorely needed in light of the fact that the institute struggled to come up with the last \$100,000.

"We were supposed to have it by July," Gee said. "We were able to submit our final paperwork to the city in October."

The city has not yet made the payment from that installment to the institute.

See OCEAN, page 5

WHAT'S UP

- CALENDAR/15
- CROSSWORD/19
- LETTERS/6
- MOVIES/15
- MUSIC/20
- SHERIFFS/8
- SPORTS/11
- TOM BLAKE/19 ►



DANA POINT SINCE 1972, ONLY FROM THE ORANGE COUNTY REGISTER

STUCK:

From page 1

"As of yet, we have not received an official word from

ST. TIMOTHY'S

CATHOLIC CHURCH

Crown Valley Pkwy. & Nuevo Vista in Laguna Niguel

Parish Office: 249-4091

Sunday Masses: 6:30, 8:30, 10:30,

12:30 & 6:00 P.M.

Saturday Evening Mass: 5:00 P.M.

SOUTH COAST
CHRISTIAN
ASSEMBLY

A Church Where Love Abounds

SUNDAY

Worship Celebrations

8:30 and 10:45 a.m.

Spiritual Discovery Hour

9:45 a.m.

Classes for all ages

Inspiration and Praise

6:00 p.m.

WEDNESDAY

Family Assembly

7:00 p.m.

Children's activities

and nursery care

are provided during all services

Darrell W. Ward, Pastor

31501 Avenida Los Cerritos

San Juan Capistrano

Near Ortega Hwy and the 5 Freeway

(949) 240-4777

WEB Site: <http://www.casm.com>
Affiliated with the Assemblies of God

those agencies determining if the area is an artificial drainage swail or a wetland."

For more than 20 years, Pam Tappan, whose home is adjacent to the project, thought the property was indeed a natural wetland.

Then four months ago, she thought she learned otherwise. Workers removed dense vegetation from a corner of the site, revealing a concrete headwall and a storm drain.

Tappan, 54, then began to wonder if a ponding of urban runoff on the vacant land has had any role in what she describes as a remarkable coincidence of illnesses in homes on her street.

A neighbor died of cancer. Another lost his foot to cancer. One has Crohn's Disease. Another has hypogammaglobulinemia. A fifth has Polycythemia Vera. And Tappan said she herself has had four benign tumors removed.

The six homes border the open drainage ditch.

In recent weeks, Tappan appealed to city, county, state and federal officials - anyone who would listen - to get the soil and water tested.

"This is too much of a coincidence," Tappan said. "Maybe I'm overreacting, and I hope I am. Who knows what causes cancer? It's just kind of scary that every single house here - and nobody else on the block - has any health issues. It could be a very strange coincidence, and I'm hoping it is. If this is toxic, somebody has got to be responsible for it."

"They can have it tested," said Paul Douglas, who is preparing to build the eight houses and said he has recommended a company that could do the tests. "If it were truly contaminated, we would have

had evidence of it during our soil sampling. Trust me, when you hit contamination, you know it. And there's no contamination there."

On Tuesday TRC, an Irvine company that does soil testing, was at the site.

"They are testing the water and soil for toxic chemicals, pesticides and other harmful items," Tappan said. "I thanked the gentleman for doing this. I don't know who hired him, but that is all I ever wanted was to get the urban runoff tested."

Douglas said he has recently discovered two drains that send water onto his property from the Calle Anejo homes. He also said a palm tree root was discovered, blocking the storm drainpipe. He suggested that if there is a problem, it could be water coming off the neighbors' yards.

"If that true," Tappan said, "why is the pond next to the headwall larger today than yesterday? Plus, how did the water flow up hill to create this pond?"

And why is the dirt dry between our backyards and the pond. I am no scientist, but I didn't think water could fly from one area to another."

"They've been trying to stop this project from day one," Douglas said. "They want the city to acquire this property and turn it into a park. They don't want an active park. They want a passive park."

Tappan said that isn't the case. "We do not wish to stop this development," she said. "We want the soil to be tested."

Tappan appeared before the San Clemente City Council several weeks ago, asking for testing. While her street is in Capistrano Beach, and so is Douglas' site, the storm drain

is in San Clemente, emptying onto Capistrano Beach land.

"The city of San Clemente has just said, no, it's not our problem," Tappan said.

David Lund, San Clemente's public works and economic development director, had little comment. "We are working cooperatively with the city of Dana Point, the city manager and his engineering team to try to resolve this matter," he said. "That's all I'll say."

"The key is to identify what the actual source is," Dana Point City Manager Doug Choate's said. "My query to (Lund) was what is the source? He is providing source maps."

Tappan wrote to county Supervisor Tom Wilson and sought help from the California Water Resources Control Board and the U.S. Environmental Protection Agency.

"This has turned into a very frustrating situation," one of the letters said. "I have contacted numerous state and county agencies. Not one of them can help me."

Monica Mazur of the Orange County Environmental Health Agency said she couldn't address any suggested link between particular illnesses and a storm drain.

"It's not unusual to have uncovered urban runoff ... that flows right next to houses," she said. "This happens all over the county. Just look at storm drains. They're everywhere. There's one in San Clemente that is the property line between two houses."

Mazur said, "It's not like it's coming from an industrial area. From what I can tell, it's from a residential area, and it's a very, very tiny watershed."

Barbara Drummond, a Calle Anejo neighbor, said her 42-year-old husband, David,

contracted a type of leukemia found mostly in men in their 60s. The Drummonds have lived on Calle Anejo for five years.

"He's been healthy as a horse," Drummond said. "When it was diagnosed, the doctors thought there was no way it could be it, because it happens in older men, and it's a very rare disease in general." Drummond said she wanted the soil and water tested.

"If they're going to build new homes on it, the last thing you'd want to do is build new homes where people moving in there could possibly get sick," she said. "We hope there's no validity. There's so many people, you just sort of have to raise the question."

Douglas said he is installing a storm drain that will collect water from the existing drain, filter it and take it, along with filtered runoff from his development, to Camino Capistrano. "We will be filtering all of the storm runoff, which isn't being done by the city of San Clemente or Calle Anejo," he said. "We're putting in a double filter system."

Kevin Kipper, a 20-year-old Calle Anejo resident whose foot was amputated due to cancer, said he believes testing is a good idea but the drainage ditch didn't cause his illness.

Larry Straight, whose 20-year-old son, Zach, has Crohn's Disease, said it's probably good to test the water and soil for contaminants.

"We haven't in our mind made that connection," Straight said. "I wish I knew what are the causes of Crohn's Disease in my son. I don't have any facts to say I believe it came out of that ditch ... I don't know that I would follow that conclusion."